1-1-1986

Implementing Agricultural Preservation Programs: A Time to Consider Some Radical Approach?

Julian C. Juergensmeyer
Georgia State University College of Law, jjuergensmeyer@gsu.edu

IMPLEMENTING AGRICULTURAL PRESERVATION PROGRAMS: A TIME TO CONSIDER SOME RADICAL APPROACHES?

Julian Conrad Juergensmeyer*

Nationally, the controversy rages over the issue of whether the farmland conversion syndrome has reached crisis proportions or has been greatly exaggerated.[1] In many areas of the country, the future need for farmland preservation may be long range or even non-existent since overproduction rather than shortage poses the most imminent threat to many sectors of American agriculture.[2] In some areas, however, the crisis has occurred, time has already run out, and most current farmland preservation approaches are inadequate and meaningless. New approaches and concepts are necessary.

---

* B.A., Duke University; J.D., Duke University; Professor of Law and Co-Director of the Center of Agricultural Law, University of Florida. I especially would like to thank Alan Armour, my research assistant, for his dedication and help in the preparation of this presentation.

1. No other area of agricultural law has been as widely written and published upon. For broader treatments of the subject, see C. LITTLE, LAND AND FOOD: THE PRESERVATION OF U.S. FARMLAND, AMERICAN LAND FORUM (Washington 1979); M. COTNER, *Land Use Policy and Agriculture: A State and Local Perspective*, U.S. DEPT. OF AG. ECONOMIC RESEARCH SERVICE (Washington 1974); E. ROBERTS, THE LAW AND THE PRESERVATION OF AGRICULTURAL LAND (1982); URBAN LAND INSTITUTE, *Has the "Farmland Crisis" Been Overstated?: Recommendations for Balancing Urban and Agricultural Land Needs*, 1983 ZONING AND PLANNING LAW HANDBOOK 235, 266 (Strom ed. 1983); URBAN LAW INSTITUTE: ENVIRONMENTAL COMMENT, *Preservation of Prime Agricultural Land* (Washington, Jan. 1978); Baden. *Agricultural Land Preservation: Threshing the Wheat From the Chaff*, INST. ON PLAN. ZONING & EMINENT DOMAIN 171 (1983); Fischel, *The Urbanization of Agricultural Land: A Review of the National Agricultural Lands Study*, 58 LAND ECON. 236 (1982); Freilich, *Saving the Land: The Utilization of Modern Techniques of Growth Management to Preserve Rural and Agricultural America*, 13 URB. LAW 27 (1981); Glenn, *La Protection du Territoire Agricole au Quebec*, 11 GENERALE DE DROIT 209 (1980); Hand, *Right-to-Farm Laws: Breaking New Ground in the Preservation of Farmland*, 45 U. PITT. L. REV. 289 (1984); Juergensmeyer, *Farmland Preservation: A Vital Agricultural Law Issue for the 1980's*, 21 WASHBURN L.J. 443 (1982); Keene, *Agricultural Land Preservation: Legal and Constitutional Issues*, 15 GONZ. L. REV. 621 (1980).

2. URBAN LAND INSTITUTE, *Has the "Farmland Crisis" Been Overstated?: Recommendations for Balancing Urban and Agricultural Land Needs*, 1983 ZONING & PLAN. LAW HANDBOOK, 235, 266 (Strom ed. 1983).

The crisis analysis certainly seems appropriate at the current time in the northern portion of the Florida citrus belt. The virtually unprecedented freeze of December 1983, the outbreak of citrus canker in 1984, and another precedent setting freeze in some areas in early 1985, has left the future agricultural status of thousands of acres of land in grave doubt. Many of these acres, which have been devoted to profitable citrus production for many years, are now experiencing the devastating effects of the farmland conversion syndrome.[3]

The spector of citrus trees being sacrificed to bulldozers and the infestation of condominiums or retirement housing is by no means new in the northern half of the Florida citrus belt. Nonetheless, the relative prosperity of the citrus industry[4] had made agricultural use of land an economically viable alternative to urban sprawl until the past few months. Now, with the large scale destruction of citrus groves by freeze and disease, countless grove owners find land development much more appealing than replanting. If farmland preservation is ever to be a meaningful concept to prevent the conversion of vast areas of groveland to non-agricultural uses, there must be an immediate and perhaps drastic re-

---

3. It is estimated that 120,000 acres of citrus were destroyed in the December 1983 freeze. The estimated direct economic loss to the citrus industry due to the December 1983 freeze exceeds $1.5 billion. The acreage destroyed amounts to 13.59% of Florida's citrus land. For a detailed breakdown and analysis on the future agricultural impact of the above figures, see CENTRAL FLORIDA FREEZE RECOVERY TASK FORCE - *Final Report*, Institute of Food and Agricultural Sciences, University of Florida (1984). In 1984, the State of Florida burned and destroyed seven million young citrus trees in an effort to eradicate the citrus canker. The citrus industry has spent more than $13 million in its efforts to eradicate the citrus canker. *See, e.g., Winter Freezes Drive Citrus Growers South*, Gainesville (Fla.) Sun, Mar. 26, 1985, at 8B, col. 1; *Senators Say State has Done Too Little to Eradicate Canker*, Gainesville (Fla.) Sun, April 1985, at 12A, col. 1. Although the destruction reports on the 1985 freeze have not yet been compiled, Ben Hill Griffin, Jr., Chairman of the Florida Citrus Commission, has indicated that the 1985 freeze will rival the December 1983 freeze. *See*, "Citrus Can Compete If Growers Emphasize Quality Over Quantity," Florida Trend, at 68 (April 1985).

4. Florida has consistently dominated the nation's citrus production. Florida typically crops roughly 70 percent of the nation's citrus production. *See* FLORIDA CROP AND LIVESTOCK REPORTING SERVICE, *Florida Agricultural Statistics, Citrus Summary 1984*, lt 4-5. The five-year (1979-84) average return for central Florida orange groves was $1,243.38 per acre. *Budgeting Costs and Return: Central Florida Citrus Production 1983-84*, INSTITUTE OF FOOD AND AGRICULTURAL SCIENCES, UNIVERSITY OF FLORIDA (June 1984); The five-year (1979-84) average return for Indian River (Fla.) white seedless grapefruit was $662.78 per acre. *Budgeting Costs and Return: Indian River Citrus Production 1983-84*, INSTITUTE OF FOOD AND AGRICULTURAL SCIENCES, UNIVERSITY OF FLORIDA (June 1984).

sponse. Central Florida does not have time to argue over the crisis analysis. The crisis is at hand. This crisis will likely provide an immediate testing ground for farmland preservation programs. Consequently, potential responses to the crisis should be of particular importance to all of those interested in farmland preservation throughout the nation. In short, precedent helpful to other jurisdictions could be in the making in Florida.

This presentation offers a proposal that could provide a meaningful framework for tailoring a farmland preservation program to respond to the Florida crisis. The legal framework for various farmland preservation programs is explored elsewhere in this colloquium;[5] and the author has expressed his view on several previous occasions.[6] This presentation will therefore concentrate on the formulation and implementation of farmland programs and on a somewhat novel approach - a farmland preservation impact fee.

A. Formulating an Agricultural Lands Preservation Program: The Trinity.

Once a unit of government decides to embark upon a farmland preservation program, three key disciplines and the professionals who practice them should be identified and interrelated. The three disciplines are planning, economics, and law. Many existing programs suffer from the absence or inadequate involvement of one or even two of these disciplines.

The importance of planning and planners to the successful and proper formulation of a farmland preservation program is conceptually obvious. At the dawn of the land use control era, the courts and model statutes recognized as a self-evident principle that zoning and other land use regulatory power must be exercised to implement a comprehensive land use plan.[7] One of the greatest

---

5. *See* J. WADLEY, *Farmland Preservation*, 20 Gonz. L. Rev. 683 (1985). *See also, infra* notes 23-51 and accompanying text.

6. *See* 1 J. JUERGENSMEYER & J. WADLEY, AGRICULTURAL LAW Ch. 4 (1982); Juergensmeyer, *Farmland Preservation: A Vital Law Issue for the 1980's*, 21 WASHBURN L.J. 443 (1982); Juergensmeyer, *Introduction: State and Local Land Use Planning and Control in the Agricultural Context*, 25 SAN DIEGO L. REV. 463 (1980); Juergensmeyer & Wershow, *Agriculture and Changing Legal Concepts in an Urbanizing Society*, 26 U. FLA. L. REV. 78 (1975).

7. The requirements of a comprehensive plan were contained in ADVISORY COMMITTEE ON ZONING, U.S. DEPT. OF COMMERCE, *A Standard State Zoning Enabling Act* (Washington

tragedies of land use control law was the permissiveness of courts to recognize mere zoning maps as satisfaction of the comprehensive plan requirement. Even today, in only a few states are there *mandatory* planning requirements for those units of local government which exercise the land use control power.[8] Fortunately, Florida is one of those jurisdictions.

The Local Government Comprehensive Planning Act[9] mandates comprehensive planning by Florida's local governments. This Act requires a future land use plan element, designating proposed future general distribution and the location and extent of various land uses, including agricultural use.[10] The Act further requires a recreation and open space element, indicating a comprehensive system of public and private recreation sites.[11]

The planning element of any agricultural land preservation program in Florida is therefore grounded in statutory law.[12] In states without the legal requirement for planning, common sense dictates considerable involvement of planners. How else could the agricultural land use be coordinated with other present and projected land use policies? Nothing could guarantee the quicker demise of a preservation program than to find agricultural land designated for preservation also designated for housing development or planned as the location of a new transportation route.

---

rev. ed. 1926). *See generally* Curtis v. City of Los Angeles, 156 P. 462 (Cal. 1916); Mayor & Council of Wilmington v. Turk, 129 A. 512 (Del. Ch. 1925); State *ex rel.* Henry v. City of Miami, 158 So. 82 (Fla. 1934). For the seminal discussion in this area, see Haas, *In Accordance with a Comprehensive Plan*, 68 HARV. L. REV. 1154 (1955). Holmgren v. City of Lincoln, 199 Neb. 178, 256 N.W.2d 686 (1977) ("A comprehensive plan is a guide to community development . . ."); Udell v. Haas, 21 N.Y.2d 463, 288 N.Y.S.2d 888, 893 (1968) (". . . the comprehensive plan is the essence of zoning. Without it, there can be no rational allocation of land use."); Hunt v. City of San Antonio, 462 S.W.2d 536, 540 (Tex. 1971) ("If the zoned area may be encroached upon from the edge, the effect is to cause the comprehensive plan to collapse . . .").

8. *See, e.g.*, CAL. GOV'T CODE § 65300 (West Supp. 1984); FLA. STAT. § 163.3161 (1983); IDAHO CODE ANN. § § 67-6508 and 67-6511 (1980); VA. CODE § 15.1-446.1 (1981).

9. FLA. STAT. § § 163.3161, and 163.3211 (1983). On or before July 1, 1979, each county and each municipality in the state was required to prepare and adopt a comprehensive plan. FLA. STAT. § 163.3167(2) (1977). For a general discussion on the Act, see 1 J. JUERGENSMEYER & J. WADLEY, FLORIDA LAND USE RESTRICTIONS § 4.04 (1979). *See also* T. PELHAM, State Land-Use Planning and Regulation (1979).

10. FLA. STAT. § 163.3177(6)(a) (1983).

11. *Id.*

12. *Id.*

The second discipline, agricultural economics, has been a respected discipline for several decades, but the use of economic analysis in land use planning in general, and farmland preservation programs in particular, is sorely lacking. Although many socio-economic and demographic factors affect the decision of landowners to keep their land in agricultural production or to convert it to non-agricultural uses, the economic factor is frequently the key.[13] It takes a very strong love of the soil to keep land in farming when its development value is 1,800% more than its farm value.[14] If a farmland preservation program is to be acceptable to farmers and have a chance of success, the program must be designed on the basis of economic analysis that makes farming the land in the future economically feasible. If the farmland preservation program is mandatory, the agricultural use of the land must be economically feasible or the taking issue will be raised and used to invalidate the program on principles of unconstitutionality.[15] Intricate and sophisticated economic studies—not just estimates of value by a real estate appraiser—should be one of the initial steps in the formulation of a farmland preservation program.[16]

The third participant in the formulation of a preservation program is the lawyer. The lawyer is perhaps the program's least important participant as compared to the vital roles that land use planners and economists play in formulating and implementing farmland preservation programs. However, because farmland preservation law is at best a murky field, careful legal drafting is essential. This is particularly true when it comes to defending the program from the ever present ogre of the taking issue.[17]

13, Healy & Short, *New Forces in the Market for Rural Land*, 46 APPRAISAL J. 185, 190 (April 1978). *See also* Newton & Boast, *Preservation by Contract: Public Purchase of Development Rights in Farmland*, 4 COLUM. J. ENVTL. L. 189, 195-196 (1978).

14. *Supra* note 13. For a more detailed discussion on the socio-economic and demographic factors affecting farmland conversion, see 1 J. JUERGENSMEYER AND J. WADLEY, AGRICULTURAL LAW § 4.1 (1982).

15. Freilich, *Saving the Land: The Utilization of Modern Techniques of Growth Management to Preserve Rural and Agricultural American*, 13 URB. L. 27, 31 (1981).

16. Torres, *Helping Farmers and Saving Farmland*, 37 OKLA L. REV., 31 (1984). The author suggests the use of transferable development rights as a possible solution to compensate the farmer for loss of his property's development value. *See also* Freilich, *supra* note 15, at 42-43.

17. For a leading discussion on the taking issue, see F. BOSSELMAN, D. CALLIES & J. BANTA, THE TAKING ISSUE (1973). *See also infra* notes 28-51 and accompanying text.

Once the farmland preservation program is formulated, the lawyer's role in drafting statutes and/or local government ordinances that effectuate the program's goals and policies becomes a key factor. Comprehensive plans must be reformulated or amended at state, regional, and local government levels to incorporate the program. The farmland preservation programs should be integrated so as to complement, rather than contradict, existing agricultural policies and land use regulations that affect agriculture. It is necessary that administrative machinery be established or identified to administer the day-to-day operation of the farmland preservation program.

The failure - or limited success - that most existing farmland preservation programs have encountered results from poor or inadequate planning, economic analysis, and legal resourcefulness. Identifying and anticipating the problems which farmland preservation programs will encounter is an essential ingredient for the successful implementation of any program.

B. The Issue of Compensating Landowners

The key obstacle to a program's successful implementation is the real or perceived economic threat to property values and the potential cost to the enacting government unit commonly associated with farmland preservation programs. If a landowner receives no compensation for a land use restriction which limits his land to agricultural uses only, his economic survival may be threatened. Furthermore, the farmland preservation program itself may be threatened by landowner opposition. If the landowner is compensated for his loss in economic value, the governmental unit's budget, which would bear the economic burden of compensation, may be threatened. Consequently, the farmland preservation program may never be implemented because the governmental entity is unable or unwilling to expend the funds to implement the preservation program. Is there a way out of this dilemma?

Thus far it has been assumed that there will be a meaningful economic loss in value if farmland is "protected" from being converted to non-agricultural uses. In most instances—almost by definition—this will be the case. If farmland needs protection it is usually because there is development demand for the land in

question.[18] If there is not, then even if the land goes out of agricultural production, perhaps due to the death, retirement, or bankruptcy[19] of the current farmer, it will remain available for agricultural use in the future and, therefore, does not need a farmland protection program. Consequently, the economic effect of most farmland preservation programs will deprive the farmland of its development potential value.

Farmland protection programs may have some economically positive influences on land values that would alleviate or even cancel out the loss in value. Tax breaks could be worked into the preservation program that will increase the farmer's net profit. In addition, farmland may become more valuable when a program guarantees that the parcel in question and the surrounding land will remain in agricultural production thereby causing economies of scale in regard to marketing and supply.[20] The same economic effect may result from the protection that farmland will receive from the potential imposition of liability under a possible nuisance action brought by encroaching urban developers or residents.[21]

In short, the institution of a farmland protection program is not entirely and inevitably negative as far as the economic value of the subject farmland is concerned. Nonetheless, in many, if not most, instances there will be a significant decrease in the land's fair market value if the real or hypothesized highest and best use of the property is for development rather than agricultural purposes. The critical question therefore is must the governmental entity agree to compensate the landowner or risk a judicial declaration of unconstitutional invalidity on the theory that the farmland preservation program constitutes a taking of property without just compensation? Additionally, if there is not a taking, should the

---

18. *See supra* note 13.

19. Total farm debt outstanding in the United States has risen from approximately $11.2 billion in 1959 to more than $216 billion in 1983. U.S.D.A., *Outlook and Situation*, Table 5 (1983). Accompanying this increase in the use of credit has been a corresponding increase in the number of bankruptcies filed. *Farm Credit Administration Agricultural and Credit Outlook '83*, at 18-24 (1983). For a general discussion on agricultural debt problems, see Harl, *Problems of Debt in Agriculture*, 6 J. AGRIC. TAX'N & L. (1985).

20. Healy & Shurt, *New Forces in the Market for Rural Land*, 46 APPRAISAL J. 190 (April 1978).

21. For a general discussion on agricultural nuisance liability, see 2 J. JUERGENSMEYER & J. WADLEY, AGRICULTURAL LAW Ch. 25 (1982).

landowner be compensated?

This author believes there is usually not a taking of property without just compensation. If the land retains meaningful economic value, then a decrease in fair market value - if considerable - should not constitute a "taking" as courts currently apply that concept. The taking issue and property law concepts are discussed at length elsewhere in this colloquium and the basics will not be reviewed here.[22] Instead, this author will simply state his analysis of the current state of the law and how the law on point should develop.

In spite of the unsettled state of the law, judicial decisions have slowly moved away from nineteenth century tort law descriptions of real property rights that focus upon "rights".[23] Gone, or at least under attack, is the idea that real property ownership should be defined in terms stating that a man can do anything he wishes with his property subject to tort liability if he causes damage to another persons land.[24] What is being adopted is Professor Leon Duguit's legal sociology concept of property rights, usually labelled the social function theory of ownership. This theory suggests that land ownership serves a social function and that ownership rights are relative, not absolute, and are defined so as to accomplish societal interests.[25]

A legal historian, however, would argue that adoption of the social function theory of ownership is not a movement toward a new concept but a re-recognition of the ignored but never abandoned original common law concept of real property ownership. It is true that our common law heritage has always conceptualized real property ownership rights as a combination of privileges and responsibilities related to the right to use land and not really own

---

22. *See* J. WADLEY, *Farmland Preservation*, 20 GONZ. L. REV. 683 (1985). *See also, infra* notes 28-51 and accompanying text.

23. The social function theory of ownership basically negates the concept of absolute private ownership of property. Ownership is not an absolute right but a right that is permitted and protected to the extent it is consistent with the needs of society at a given time. *See* Juergensmeyer, *The American Legal System and Environmental Protection*, 23 U. FLA. L. REV. 439, 446-47 (1971).

24. The foundation of much of the common law of nuisances revolves around the maxim "sic utere tuo ut alienum non laedas." For an excellent judicial discussion of this concept, see Village of Euclid v. Ambler Realty Co., 272 U.S. 365, 387 (1926).

25. DUGUIT, LAW IN THE MODERN STATE (1919).

it in the personal property sense.[26] Professor Wadley's presentation also discusses these ownership concepts[27] so only the key statements of the leading cases and commentaries which express the social function theory will be presented here.

In the landmark case, of *Pennsylvania Coal Co. v. Mahon*,[28] Justice Holmes clearly recognized that at times individual property rights must yield to societal interests. This decision was the touchstone of all subsequent "taking" law. At issue was whether a statute that forbade mining methods, removing supports and causing subsidence of homes erected above the mine, constituted a taking.[29] In holding that the statute did constitute a taking, Justice Homes acutely recognized:

> Government hardly could go on if to some extent values incident to property could not be diminished without paying for every such change in the general law. As long recognized, some values are enjoyed under an implied limitation and must yield to the police power. But obviously the implied limitation must have its limits, or the contract and due process clauses are gone. One fact for consideration in determining such limits is the extent of the diminution. When it reaches a certain magnitude, in most if not in all cases there must be an exercise of eminent domain and compensation to sustain the act.[30]

Thus, in Justice Holmes' view, the distinction between a valid exercise of the police power and a taking was a difference of degree not kind.[31]

Shortly after the *Pennsylvania Coal Co.* decision, the United States Supreme Court decided the leading zoning case of *Village of Euclid v. Ambler Realty Co.*[32] where the Court upheld the validity of comprehensive zoning ordinances in general. The *Euclid* Court

---

26. For a broad discussion on the history of the social function theory of ownership, see the mimeographed but unpublished lectures of Professor M.E. Kadem of the University of Geneva, prepared for the Faculte International pour l'Enseignement du Droit Compare. Professor Kadem, in these lectures entitled La Notion et les Limities de la Propriete Privee en Droit Compare, dates the acceptance of the social function theory of ownership in the United States from the enactment of the major items of New Deal legislation.

27. *See* J. WADLEY, *Farmland Preservation*, 20 GONZ. L. REV. 683 (1985).

28. 260 U.S. 393 (1922).

29. *Id.* at 412. This statute was commonly known as the Kohler Act. *Id.*

30. *Id.* at 413.

31. *Id. See* F. BOSSELMAN, D. CALLIES & J. BANTA, THE TAKING ISSUE (1973) for an excellent discussion and analysis of *Pennsylvania Coal* and its impact on taking law.

32. 272 U.S. 365 (1926).

implicitly adhered to the social function theory of ownership in rationalizing that the subject zoning ordinance, and all similar laws and regulations

> must find their justification in some aspect of the police power, asserted for the public welfare. The line which in this field separates the legitimate from the illegitimate assumption of power is not capable of precise delimitation. It varies with circumstances and conditions. A regulatory zoning ordinance, which would be clearly valid as applied to the great cities, might be clearly invalid as applied to rural communities.[33]

The next leading case to express the social function theory was *United States v. Willow River Power Co.*[34] At issue was whether the action of the United States in raising the water level of the St. Croix River, which allegedly impaired the efficiency of the company's hydroelectric plant, constituted a compensable "taking" of private property.[35] The Court, in holding that the action did not constitute a compensable taking, articulated:

> not all economic interests are "property rights"; only those economic advantages are "rights" which have the law back of them, and only when they are so recognized may courts compel others to forbear from interfering with them or to compensate for their invasion. . . . Such economic uses are rights only when they are legally protected interests.[36]

Finally, in the landmark case of *Penn Central Transportation Co. v. New York City*[37] the United States Supreme court, drawing from more than fifty years of "taking" jurisprudence, carefully analyzed current "taking" law.[38] The question presented to the Court was whether a city may restrict the development of historical landmarks without effecting a "taking" requiring the payment of

---

33. *Id.* at 387.

34. 324 U.S. 499 (1945).

35. *Id.* at 499-500. The Willow River Power Company alleged that the United States' action was violative of the fifth amendment, which requires just compensation for the "taking" of private property for public use. *Id.* at 500.

36. *Id.* at 502-03.

37. 438 U.S. 104 (1978).

38. The Court articulated a number of factors that should be considered when engaging in the ad hoc taking analysis: (1) whether there is a physical invasion of the property; (2) the degree to which there is a diminution in the value of the property; (3) whether the regulation promotes the public health, safety, welfare, or morals; (4) the extent to which investment-backed expectations are frustrated; and (5) whether the regulation promotes a public benefit or prevents a public harm. *Id.* at 124-35.

just compensation.[39] Specifically, the Court concluded that New York City's Landmarks Preservation law did not constitute a taking of land occupied by Grand Central Terminal.[40]

> [T]he question of what constitutes a "taking" for purposes of the Fifth Amendment has proved to be of considerable difficulty. . . . The Court, quite simply, has been unable to develop any "set formula" for determining when "justice and fairness" require the economic injuries caused by public action be compensated by the government, rather than remain disproportionally concentrated on a few persons. Indeed, we have frequently observed that whether a particular restriction will be rendered invalid by the government's failure to pay for any losses proximately caused by it depends largely "upon the particular circumstances [in that]case."[41]

Two leading state court cases addressing the "taking" issue, and further expressing the social function theory, are deserving of discussion. In *Just v. Marinette County*,[42] the Supreme Court of Wisconsin upheld the constitutional validity of a shoreland zoning ordinance designed to prevent the degradation and deterioration of navigable waters and the public rights resulting from the uncontrolled use and development of shorelands.[43] The ordinance prohibited altering the natural character of land within certain distances from navigable waters.[44] In so holding, the court recognized that "[a]n owner of land has no absolute right to change the essential material character of his land so as to use it for a purpose for which it was unsuited in its natural state and which injures the right of others."[45]

In *Graham v. Estuary Properties, Inc.*,[46] the Florida Supreme Court upheld the Florida Land and Water Adjudicatory Commission's final order denying approval for the development of a substantial wetland area. The court, in suggesting that land ownership serves a social function, cited to the above quote from *Just*[47] and stated that "[t]he owner of private property is not entitled to the

39. *Id.* at 107.
40. *Id.* at 138.
41. *Id.* at 123-24.
42. 201 N.W. 2d 761 (Wis. 1972).
43. *Id.* at 764-65.
44. *Id.*
45. *Id.* at 768.
46. 399 So. 2d 1374 (Fla. 1981), *cert. denied, 454 U.S. 10 (1982).*
47. *Id.* at 1382.

highest and best use of his property if that use will create a public harm."[48] Consequently, because of the environmentally sensitive nature of wetlands, the court prohibited development of the area since it would adversely impact the surrounding environment.[49]

Lastly, in THE TAKING ISSUE,[50] a leading land use commentary, the authors suggest:

> the fear of the taking issue is stronger than the taking clause itself. It is an American fable or myth that a man can use his land any way he pleases regardless of his neighbors. The myth survives, indeed thrives, even though unsupported by the pattern of court decisions. Thus, attempts to resolve land use controversies must deal not only with the law, but with the myth as well.[51]

Even though the threat of the adoption of a concept of "regulatory taking" lingers in the brooding omnipresence of possible judicial decisions, the current law is, and in the opinion of the author should continue to be, that compensation is not constitutionally required when the conversion to non-agricultural use is forbidden to owners of agricultural land, if a meaningful economic return on the agricultural use value of the farmland "protected" by the preservation program is still possible.

This social function theory of ownership does not, however, in any way preclude the desirability or even the political and economic need to compensate farmers for economic loss due to farmland protection program restrictions. The current economic crisis in the agricultural sector of the United States[52] makes nearly all farmers worthy recipients of nearly any imaginable largesse. The economic mitigation of land use regulation has long been recognized by land use control law scholars and attempted in several countries.[53]

---

48. *Id.*

49. *Id.* at 1379.

50. F. BOSSELMAN, D. CALLIES, & J. BANTA, THE TAKING ISSUE (1973).

51. *Id.* at 318-19.

52. All one has to do is pick up and read any newspaper or national magazine to learn of the current economic crisis that the American farmer is experiencing.

53. J. COSTONIS & R. DEVOY, THE PUERTO RICAN PLAN: ENVIRONMENTAL PROTECTION THROUGH DEVELOPMENT RIGHTS TRANSFER (1975); D. HAGMAN, WINDFALLS FOR WIPEOUTS (1972); *See* J. ROSE, THE TRANSFER OF DEVELOPMENT RIGHTS (1975); REGIONAL SCI. RESOURCES INST., *Untaxing Open Space: An Evaluation of the Effectiveness of Differential Assessment of Farm and Open Space* 23 (1976); Costonis, *The Chicago Plan: Incentive*

Why then do we argue about whether farmers *must* be compensated for lost value when a farmland preservation program is implemented? Is not the answer clear - most taxpayers do not want their taxes raised (or existing government tax funded programs cut) to pay the cost.

Therefore, if one accepts the proposition that the most serious obstacle to the successful implementation of farmland preservation programs is the necessity or desirability of compensating farmers for the decrease in value their land usually suffers when subjected to a farmland preservation program, then the "solution" is to find a satisfactory source for such funds.[54]

A landowner under a farmland protection program suffers what is commonly referred to as a "wipeout." Public control of the use of land generally has the effect of increasing or decreasing land values. "Wipeouts" occur when the value of real property decreases due to factors beyond the landowner's control, whereas "windfalls" occur when real property value increases due to factors beyond the landowner's control. Under a rational land-use control system, ideally "windfalls" should equal "wipeouts."[55] Therefore, "windfalls" must be recaptured to mitigate "wipeouts." How can we recapture "windfalls" to compensate those farmers that have suffered "wipeouts" due to farmland preservation programs? A possible answer is to recapture the "windfalls" through impact fees imposed on those segments of the economicy which cause the need for farmland protection programs.

C. Proposal of a Novel Approach: An Agricultural Lands Preservation Impact Fee

Thus far, impact fees have been used to solve or at least alleviate the capital funding crunch local governments experience when they must build roads, parks, schools, jails, and other capital facili-

---

Zoning and the Preservation of Urban Landmarks, 85 HARV. L. REV. 574 (1972). Professor Hagman defined "wipeouts" as "any decrease in the value of real estate other than one caused by the owner or by general deflation." Other countries utilizing windfall/wipeout analysis in land use control regulation include Canada, Australia, New Zealand, and England. Keene, *A Review of Governmental Policies and Techniques for Keeping Farmers Farming*, 19 NAT. RESOURCES J. 119 (1979).

54. *See, e.g.*, Freilich, *supra* note 15, at 42-43; Torres, *supra* note 16.

55. D. HAGMAN & D. MISCZYNSKI, IN WINDFALLS FOR WIPEOUTS: LAND VALUE CAPTURE AND COMPENSATION 5 (1978).

ties to service new development.[56] The same factors which make impact fees essential to local governments needing funds for capital facilities construction purposes arguably extend to the need for funds by local governments to pay for farmland preservation programs. The same economic and legal underpinning also arguably exists for park impact fees and farmland preservation impact fees.

Impact fees are land regulatory charges levied by governmental units against new development to generate revenue for capital expenditures necessitated by the new development.[57] Consider, for example the need for parks and recreation areas. As new development occurs, the need for open areas - parks and recreation areas - increases because of the increase in population. Also, the availability of such land decreases because some of the land formerly available for such use is now developed.

The concept of the impact fee is not new. The first land use regulation designed to shift the capital expense burden to the developer and new residents was the required dedication. Local governments conditioned their approval of a subdivision plat upon the developer's agreement to provide and dedicate land for facilities such as streets, schools, and parks. Required dedications for these capital improvements is now a well accepted part of subdivision regulation and is generally approved by the courts if reasonable in area.[58]

---

56. *See, e.g.*, Trent Meredith, Inc. v. City of Oxnard 114 Cal. App. 3d 317, 170 Cal. Rptr. 685 (1981) (schools); City of Arvada v. City and County of Denver, 663 P.2d 611 (Colo. 1983) (water and sewer); P.W. Investments, Inc. v. City of Westminster, 655 P.2d 1365 (Colo. 1982) (parks); Hollywood, Inc. v. Broward County, 431 So. 2d 606 (Fla. Dist. Ct. App. 1983), *cert. denied*, 440 So. 2d 352 (Fla. 1983) (parks); Home Builders and Contractors Ass'n v. Palm Beach County, 446 So. 2d 140 (Dist. Ct. App.), *cert. denied*, 451 So. 2d 848 (Fla. 1983) (roads); Town of Longboat Key v. Lands End, Ltd., 433 So. 2d 574 (Fla. Dist. Ct. App. 1983) (parks); Contractors & Builders Association v. City of Dunedin, 329 So. 2d 314 (Fla. 1976) *cert. denied*, 444 U.S. 867 (1979) (water and sewer); Coulter v. City of Rawlins, 662 P.2d 888 (Wyo. 1983) (water and sewer).

57. *See generally* Connelly, *Road Impact Fees Upheld in Noncharter County*, FLORIDA BAR J. (Jan. 1984); Jacobsen & Redding, *Impact Taxes: Making Development Pay Its Way*, 55 N.C.L. REV. 407 (1977); Juergensmeyer and Blake, *Impact Fees: An Answer to Local Governments' Capital Funding Dilemma*, 9 FLA. ST. U.L. REV. 415 (1981); O'Connell and Schoech, *Impact Fees: The Current State of the Law and Practice in Florida*, 8 A.B.A. PLANNING AND LAW DIVISION NEWSLETTER (1984).

58. *See* Billings Properties, Inc. v. Yellowstone County, 394 P.2d 182 (Mont. 1964) (dedication for recreational purposes upheld); Arnett v. City of Mobile, 449 So. 2d 1222 (Ala. 1984) (dedication of right-of-way for future thoroughfare); Wald Corp. v. Metropolitan

The "in lieu" fee developed as a refinement of required dedications.[59] The "in lieu" fee substitutes a money payment for dedication of land when the governmental unit determines the latter is not feasible. For example, to require each and every subdivision to dedicate land for parks would not necessarily provide an acceptable park system because the sites would often be inadequate in size and unsatisfactorily located.

The impact fee is functionally and conceptually similar to the in lieu fee in that both are required payments for capital outlays necessitated by new development. The impact fee concept, however, is a much more flexible tool and is an important if not essential tool in monitoring land use regulation based on impact analysis through linkage and mitigation devices.[60]

An impact fee for an agricultural lands preservation program would be grounded in the following analysis. One of the key impacts of new development is to convert agricultural lands to nonagricultural uses and to place economic development pressure on surrounding farmland. Consequently, the farmland's continued use for agricultural purposes becomes economically questionable and legally and practicably difficult because of the potential incompatibility of many agricultural uses with neighboring development.[61]

The loss of agricultural land and the impairment of the continuation of agricultural uses of other agricultural land deprives the entire community, and the new development in particular, of open spaces, potential and actual recreational areas, and environ-

---

Dade County, 338 So. 2d 863 (Fla. 3rd Dist. Ct. App. 1976) (adopted the "rational nexus" test for assessing the validity of required dedications under the police power). *See also* Heyman & Gilhool, *The Constitutionality of Imposing Increased Community Costs on New Suburban Residents Through Subdivision Exactions*, 73 YALE L.J. 1119 (1964); Howard County v. JJM Inc., 482 A.2d 908 (Md. 1984) (right-of-way reservation).

59. *See, e.g.*, Jenad Inc. v. Village of Scarsdale, 18 N.Y.2d 78, 218 N.E.2d 673, 271 N.Y.S.2d 955 (1966) (in lieu fee not a tax but a reasonable form of planning); Briar West, Inc. v. City of Lincoln, 291 N.W.2d 730 (Neb. 1980) (in lieu fee for local street paving); Call v. City of West Jordan, 606 P.2d 217 (Utah 1979) (in lieu fee for flood control, park, and recreational purposes upheld); Jordan v. Village of Menomonee Falls, 137 N.W.2d 442 (Wis. 1965) (upheld constitutionality of in lieu fees for educational and recreational purposes); Coulter v. City of Rawlins, 662 P.2d 888 (Wyo. 1983) (in lieu park fee).

60. *See* Juergensmeyer and Blake, *supra* note 57. *See also* Juergensmeyer, *Drafting Impact Fees to Alleviate Florida's Pre-platted Lands Dilemma*, 7 FLORIDA ENV'T & URB. ISSUES (April 1970).

61. *See supra* text accompanying notes 16-25.

mentally protective land uses. Furthermore, the loss of and threat to agricultural land adversely affects the food supply and related economic bases of the community. Therefore, new development should be required to pay at least a portion of the cost of preserving agricultural land endangered by that new development. The new development will be directly benefited by the preservation program, which will be funded by the impact fees collected from the new development. In other words, the linkage between the new development and the need for an agricultural lands preservation program must be established. Such a connection should not be difficult to establish in Florida's frozen citrus groves as new developments spring into being.

The careful coordination of planning, economic analysis, and legal analysis discussed earlier are essential if such an impact fee is to be workable and legally defensible.[62] A review of the judicial acceptance of impact fees in Florida will illustrate the guidelines which must be followed in the development of a farmland preservation impact fee.

D. Judicial Acceptance of Impact Fees in Florida

The Florida Supreme Court in *Contractors & Builders Association of Pinellas County v. City of Dunedin*,[63] held that a properly restricted impact fee which shifts the burden of extra-development capital expenditures to new residents need not be considered a tax. The Builders Association attacked the validity of an impact fee for sewer and water capital funding, claiming that the money collected for capital improvements to the system was an invalid tax.[64] In defeating this attack, the court indicated that the connection fees bore a reasonable relationship to the costs of regulation.[65] Furthermore, the avowed purpose of the ordinance was to raise money to expand the water and sewer system, so as to accommodate the increased demand created by additional connections to the system.[66] In essence, the municipality was seeking to "shift to the user expenses incurred on his account," since those who benefit from the

62. *See supra* text accompanying notes 16-17.
63. 329 So. 2d 314 (Fla. 1976); *cert. denied*, 444 U.S. 867 (1979).
64. *Id.* at 317.
65. *Id.* at 318.
66. *Id.*

expansion should bear the cost of that expansion.[67] Because the appropriate rational nexus had been established between the fee charged and the capital costs of expansion necessitated by new users, the impact fee was held not to be a tax.[68]

In so holding, the court recognized that the costs of expansion and the timing of certain types of capital expenditures would be difficult to identify precisely and stated that "perfection is not the standard" of a city's duty in establishing a nexus between the fees charged and the capital improvements required by the new users.[69] The court further held, however, that the subject ordinance was defective for failure to incorporate appropriate restrictions on the use of the fees it collected.[70]

The Florida Supreme Court's standard of reasonableness in *Dunedin* seemingly utilizes a dual rational nexus test. The first rational nexus criterion is that the costs of expansion must be "sufficiently attributable" to the fees charged and the capital improvements necessitated by the new users. Secondly, the *Dunedin* decision indicates that the court would require only a "sufficient benefits" nexus between the fee charged and the capital improvements which benefit the new residents. This second "rational nexus" requirement is met if local government can demonstrate that its actual or projected extra-development capital expenditures earmarked for the substantial benefit of a series of developments, are greater than the capital payments required of those developments.[71] The *Dunedin* decision thus indicates that an impact fee

---

67. *Id.* "Raising expansion capital by setting connection charges, which do not exceed a pro rata share of reasonably anticipated costs of expansion, is permissible where expansion is reasonably required, if use of the money collected is limited to meeting the costs of expansion." *Id.* at 320. "Users who benefit especially, not from the maintenance of the system, but by the extension of the system . . . should bear the cost of that extension." *Id.*

68. *Id.* at 318.

69. *Id.* at 320 n.10.

70. *Id.* at 321. The requirement that publicly collected funds have appropriate restrictions on the use of such funds is commonly referred to as "earmarking."

71. This reasonableness test is similar to the two-part rational nexus test of reasonableness adopted by the Wisconsin Supreme Court in Jordan v. Village of Menomonee Falls, 137 N.W.2d 442 (Wis. 1965). The *Jordan* court addressed the constitutionality of in lieu fees for educational and recreational purposes. The court held that money payment and dedication rquirements for educational and recreational purposes were a valid exercise of the police power if there was a "reasonable" connection between the need for additional facilities and the growth generated by the subdivision. The first rational nexus was sufficiently established if the local government could demonstrate that the new subdivision had generated

which meets the flexible dual rational nexus tests should not summarily be labelled a tax.

Since the Supreme Court of Florida handed down its decision in *Dunedin*, the pressures which created the interest of local governments in enacting such fees have greatly increased and more local governments have pursued and embraced the concept. Fortunately for governments, a subsequent opinion in the *Dunedin* controversy and three 1983 Florida District Court of Appeals opinions extend the permissible uses of local government impact fees. These cases clarify the standards to be applied in determining the validity of impact fees.

The litigants in *Dunedin* "revisited" the Second District Court of Appeal shortly following the Florida Supreme Court's decision.[72] The trial court on remand had found that the defects in "earmarking" had been cured by the city but ordered a refund of the fees already paid.[73] The Second District Court of Appeal reversed, thereby preventing developers from obtaining refunds.[74] Although the holding of the court applies to a rather unique situation, the decision is quite significant because of the pro-impact fee position taken by the court.

The 1983 decisions are of much greater significance. In deciding the three cases, the courts in two major urbanizing appellate districts clarified the authority of local governments to enact such fees under their police power authority, and adopted the "reasonable nexus" tests first established in *Dunedin*. Due to the great significance of these cases, each will be analyzed in considerable detail.

---

the need to provide educational and recreational facilities for the benefit of new residents. The second rational nexus "sufficient benefit" test was met if the fees were to be used exclusively for site acquisition and the amount spent by the village in constructing additional facilities was greater than the amounts collected from the development creating the need for additional facilities.

72. City of Dunedin v. Contractors and Builders Ass'n of Pinellas County, 358 So. 2d 846 (Fla. Dist. Ct. App. 1978), *cert. denied*, 370 So. 2d 458 (Fla.), *cert. denied*, 444 U.S. 867 (1979).

73. *Id.* at 848.

74. *Id.* "There is no question that a municipality may now impose 'impact fees.' " *Id.* ". . . the City has followed the direction of the supreme court explicitly. It has specifically earmarked the impact funds for the water and sewer system expansion." *Id.*

Hollywood, Inc. v. Broward County[75] involved a fee required to be paid to the county as a condition of plan approval. This fee was required of subdivisions in incorporated or unincorporated areas of Broward County to be used for the capital costs of expanding the countywide park system. Under the challenged ordinance, a subdivider has the option (with the agreement of the county) of dedicating land, paying a fee-in-lieu of dedicating land, or paying an impact fee determined by a schedule based on the number and size of dwelling units to be built.[76]

The court first addressed the authority by which Broward County adopted the ordinance. Hollywood, Inc. asserted the act was *ultra vires* or beyond the constitutional or statutory powers of the county.[77] The court noted that Broward County is a charter county which, under the Florida Constitution, maintains broad home rule powers, and whose powers are to be broadly construed by the terms of the charter itself. The court found nothing in the county charter which would prohibit the enacted ordinance.[78]

The court then turned[79] to the allegation that the ordinance was unconstitutional because it constituted a taking without just compensation and established an invalid tax. Under the standards established by *Dunedin*, and authority from other state decisions, the court found the ordinance to be a valid exercise of the police power.[80] Impact fees or dedication requirements are permissible,

---

75. 431 So. 2d 606 (Fla. 4th Dist. Ct. App. 1983), *cert. denied*, 440 So. 2d 352 (Fla. 1983).

76. *Id.* at 607-08.

77. *Id.* at 608.

78. *Id.* at 609-10.

79. *Id.* at 610 n.3. *See supra* notes 9-11 and accompanying text for a brief discussion on the Local Government Comprehensive Planning Act.

80. *Id.* at 610-13. The court, expressly relying upon Constractors & Builders Ass'n of Pinellas County v. City of Dunedin, 329 So. 2d 314 (Fla. 1976), Wald Corporation v. Metropolitan Dade County, 338 So. 2d 863 (Fla. Dist. Ct. App. 1976), *cert. denied*, 348 So. 2d 955 (Fla. 1977), and Admiral Development Corp. v. City of Maitland, 267 So. 2d 860 (Fla. Dist. Ct. App. 1972), stated:

> From the *City of Dunedin*, *Wald*, and *Admiral Development* , we discern the general legal principle that reasonable dedication or impact fee requirements are permissible so long as they offset needs sufficiently attributable to the subdivision and so long as the funds collected are sufficiently earmarked for the substantial benefit of the subdivision residents. In order to satisfy these requirements, the local government must demonstrate a reasonable connection, or rational nexus, between the need for additional capital facilities and the growth in population

the court found, if they show a "reasonable connection" or "rational nexus" in two ways: (1) the fees offset needs sufficiently attributable to the growth in population generated by the subdivision; and (2) the funds collected are sufficiently earmarked for the substantial benefit of the subdivision residents.[81] By adhering to these two tests, "local governments can shift to new residents the reasonable capital costs incurred on their account."[82]

Broward County met the two tests for a valid impact fee in the several ways. First, the growth generated by the new subdivisions would require new parks for the county to maintain its standard of three acres per 1,000 residents, a standard which is not unreasonably high and is perhaps low. The county had provided parks for existing residents through various methods such as a bond issue. The fees collected from the new residents would not exceed the costs of providing capital park facilities for the new residents, even after those residents are credited for their future property tax payments for the bond retirement.[83] Second, the funds, by the terms of the ordinance, were earmarked to be expended "within a reasonable period of time," for the acquisition and developing parks within a reasonable distance of the subdivision (fifteen miles).[84] As a final note, the court declared that "open

---

> generated by the subdivision. In addition, the government must show a reasonable connection, or rational nexus, between the expenditures of the funds collected and the benefits accruing to the subdivision. In order to satisfy this latter requirement, the ordinance must specifically earmark the funds collected for use in acquiring capital facilities to benefit the new residents. The developer, of course, can attempt to refute the government's showing by offering additional evidence.

431 So. 2d at 611-12.

81. *Id.*

82. *Id.* at 611.

83. *Id.* at 612. The county had a $73 million bond issued to meet the current population's needs. *Id.*

84. Section 5-192-(e) of the Broward County Code, a common example of a parks and recreational impact fee ordinance, provides in pertinent part that the developer shall

> c. Agree to deposit in a non-lapsing Trust Fund established and maintained by the County an amount of money as set forth in the schedule below for each dwelling unit to be constructed within the platted area. Such amounts shall be deposited prior to the issuance of a building permit for the construction of each dwelling unit. From the effective date of this Ordinance until September 30, 1978, the amount of money to be deposited for each dwelling unit to be constructed shall be as follows and for each fiscal year thereafter shall be increased by six percent (6%)

space, green parks and adequate recreational areas are vital to a community's mental and physical well being," and as such the ordinance insuring parks and recreational facilities "falls squarely within the state's police powers. . . ."[85]

Town of Longboat Key v. Lands End, Ltd.,[86] concerned an ordinance requiring developers to deed land or pay a fee, before final approval of development plans, for acquiring open space and park land. The ordinance originally provided that developers would dedicate 1-½ acres per 1,000 residents of the development or an equivalent amount of money in lieu of the land for parks and open space and another 2-½ acres for "other specified town purposes."[87] Before the end of the trial, the town amended its ordinance to require five acres of land per 1,000 residents or a fee-in-lieu, and deleted the reference to "other specified town purposes."[88] The trial

---

compounded on an annual basis. Sixty dollars ($60.00) for each dwelling unit with up to one (1) bedroom. Eighty-five dollars ($85.00) for each dwelling unit with two (2) bedrooms. One hundred twenty-five dollars ($125.00) for each dwelling unit with three (3) or more bedrooms.

(3) The county commission shall establish an effective program for the acquisition of lands for development as regional, subregional and urban parks in order to meet, within a reasonable period of time, the existing need for county level parks, and to meet, as it occurs, the need for county level parks which will be created by further residential developments constructed after the effective date of this Ordinance. The annual budget and capital program of the County shall provide for appropriation of funds as may be necessary to carry out the County's program for the acquisition of land for county level parks. The funds necessary to acquire lands to meet the existing need for county level parks must be provided from a source of revenue other than from the amounts deposited in the Trust Fund. Such amounts shall be expended within a reasonable period of time, for the purpose of acquiring and developing land necessary to meet the need for county level parks created by the development in order to provide a system of county level parks which will be available to and substantially benefit the residents of the platted area. If a proposed plat is approved by the County Commission and recorded in the Official records after the effective date of this Ordinance then the developer shall be exempted from any provisions in the County Land Use Plan requiring the payment of impact fees for the purpose of providing funds for the acquisition of land for county level parks.

85. 431 So. 2d at 614.
86. 433 So. 2d 574 (Fla. Dist. Ct. App. 1983).
87. *Id.* at 576.
88. *Id.*

court invalidated the first ordinance, finding it to establish an invalid tax on the basis that reference to "other specified town purposes" indicated that the fees were not properly restricted to park development.[89]

The Second District Court of Appeal reversed and remanded the case to the trial court to apply the later enacted ordinance.[90] In so doing, the district court adopted the tests established in the *Hollywood, Inc.* case, and thus provided guidance regarding the evaluation of the later enacted ordinance.[91] The court specifically referred to the two rational nexus tests and stated that the fees must be shown to offset, but not exceed reasonable needs attributable to the new subdivision residents, and must be adequately earmarked for capital assets that will sufficiently benefit the new residents.[92]

In *Home Builders and Contractors Ass'n. v. Palm Beach County,*[93] a case decided seven months after *Hollywood, Inc.*, the Fourth District Court of Appeal again upheld the use of impact fees that meet the two rational nexus tests, in this case, for a non-charter county and for the use of road improvements. The Palm Beach County ordinance required "new land development activity generating road traffic" (including residential, commercial, and industrial uses) to pay a "fair share" of the cost of expanding new roads attributable to the new development.[94] The developer may pay according to a formula in the ordinance that is based on the costs of road construction and the number of motor vehicle trips generated by different types of land use.[95] Alternatively, a devel-

---

89. *Id* at 575.

90. *Id.* at 576. The court indicated that the trial court on remand should scrutinize "that portion of the ordinance which establishes the land and fee requirements in order to determine whether a proper nexus exists between the amount of land or money to be set aside and the stated residential population requirements." *Id.*

91. *Id.* The court quoted *Hollywood, Inc.*, holding that such impact fees "are permissible so long as . . . the exactions are shown to offset, but not exceed, reasonable needs sufficiently attributable to the new subdivision residents and . . . the funds collected are adequately earmarked for the acquisition of capital assets that will sufficiently benefit those new residents." *Hollywood Inc.*, 431 So. 2d at 614.

92. *Town of Longboat Key*, 433 So. 2d at 576.

93. 446 So. 2d 140 (Fla. Dist. Ct. App. 1983), *cert. denied*, 451 So. 2d 848 (Fla. 1983).

94. *Id.* at 141.

95. *Id.* at 142. The formula provides for a fee of $300.00 per unit for single family houses, $200.00 per unit for multi-family homes, and $175.00 per unit for mobile homes. *Id.*

oper may submit his own study of his fair share of the road costs. Funds collected are placed in a trust fund for expenditure in one of forty zones established throughout the county in which the development is located.[96]

Following the same line of reasoning as *Hollywood, Inc.*, the court first addressed the county's authority to enact the ordinance.[97] The court looked to the article VIII, section 1(f) of the Florida Constitution, which grants non-charter counties "such power of self-government as provided by special or general law."[98] The court found that Chapter 125, the County Government Statute, provides sufficient statutory authority for impact fees in light of the Florida Supreme Court decision of *Speer v. Olsen.*[99] The *Spear* decision interpreted the statute to be a grant of broad home rule power to non-charter counties in the absence of inconsistent general or special laws.[100] The *Home Builders* court also found statutory authority for impact fees in the Local Government Comprehensive Planning Act.[101]

The court rejected the Home Builders' argument that the ordinance violated the constitutional equal protection provisions because in a non-charter county, municipalities may "opt out" of the ordinance.[102] Noting that the Florida Constitution provides that municipalities in non-charter counties may opt out, the court decided that unequal or different charges are not improper where the legislation is otherwise a valid exercise of governmental power.[103]

Finally, the court found that the ordinance meets the requirements to be a valid fee, rather than a tax, because of the restrictions built into the assessment and use of a fee.[104] The dichotomy between a fee and tax, the court conceded, is "the most difficult

---

96. *Id.*
97. *Id.*
98. *Id.*
99. *Id.* In Speer v. Olsen, 367 So. 2d 207 (Fla. 1979) the Florida Supreme Court indicated that the intent of Florida Legislature in enacting Chapter 125 "was to enlarge the powers of counties through home rule to govern themselves." 367 So. 2d at 210-11. *See also* FLA. STAT. § 125.01(1) (1975).
100. *Home Builders*, 446 So. 2d at 142.
101. *Id. See* FLA. STAT. § 163.3161 (Supp. 1985).
102. 446 So. 2d at 144.
103. *Id. See* FLA. CONST. Art. VIII, § 1(f).
104. 446 So. 2d at 144.

point raised in this appeal," because "the distinction is very amorphous."[105] The court referred to the public policy factors that should be used to characterize impact fees as regulatory rather than taxing devices, including the legislative mandate that local governments must plan comprehensively for future growth, by quoting the following from Juergensmeyer and Blake, *Impact Fees: An Answer to Local Governments' Capital Funding Dilemma,*:

> The appropriate framework for determining whether an impact fee is a regulation or a tax is one of public policy in which a number of factors should be weighed. The home rule powers granted local governments in Florida, the legislative mandate that local governments must plan comprehensively for future growth, and the additional broad powers given them to make those plans work effectively, indicate that properly limited impact fees for educational or recreational purposes should be construed as regulations. Characterization as a regulation is particularly appropriate where an impact fee is used to complement other land use measures such as in lieu fees or dedications. If an impact fee is characterized as a regulation, its validity should then be determined by reference to the dual rational nexi police power standard.[106]

The Palm Beach ordinance specifically met the *Dunedin* tests for a valid regulatory fee because the ordinance recognized that county growth requires increased road capacity, for which the cost of providing will far exceed the fees imposed by the ordinance.[107] Significantly, the court held that the improvements paid for by the impact fees need not be used exclusively or overwhelmingly for those who pay, rather improvements need only to "adequately benefit" the development which provides the fee.[108] The rejection of an "exclusive benefit" criterion explicitly puts the court with a growing number of states that accept a more flexible use of such fees so long as they bear a reasonable relationship to the needs created by the subdivision.[109]

---

105. *Id.*

106. *Id.* at 145. *See* Juergensmeyer and Blake, *Impact Fees: An Answer to Local Governments' Capital Funding Dilemma*, 9 FLA. ST. U.L. REV. 415, 440-41 (1981).

107. 446 So. 2d at 145.

108. *Id.* at 143-44 ". . . benefit accurring to the community generally does not adversely affect the validity of a development regulation ordinance as long as the fee does not exceed the cost of the improvements required by the new development and the improvements adequately benefit the development which is the source of the fee."

109. *See, e.g.*, Associated Homebuilders of Greater East Bay, Inc. v. City of Walnut Creek, 4 Cal. 3d 633, 484 P.2d 606 94 Cal. Rptr. 630 (1971); Ayers v. City Council of Los

The three 1983 opinions show a clear decision by the Florida courts to uphold impact fees against the claim that such fees are invalid taxes and/or are unauthorized by statute. In both a charter and non-charter county, as well as in a city, the courts found sufficient authority in the constitutional and statutory "home rule" powers of local governments to enact the fees. In *Home Builders*, the Fourth District Court of Appeal also found sufficient authority for impact fees in the Local Government Comprehensive Planning Act. The decisions show a recognition of the public policy arguments in favor of impact fees, as the courts essentially abandon the semantic distinctions between "fees" and "taxes."

The validity of the fees as recognized by these cases, is not properly judged by how the fees are assessed, but rather how they are spent. The cases adopt the dual rational nexus tests as originally set forward in the *Dunedin* case. These tests require that a local government demonstrate that the need for the fee is created by the new growth (and the fee does not exceed the cost of the new growth) and that the funds collected are earmarked for the sufficient benefit of the new residents. At the same time, the courts have not looked closely at the exact methodology by which the tests are met. For example, the Palm Beach County zone system was sufficient, as was the Broward County proof of park usage patterns, to show that new residents would be sufficiently benefitted by the fees. The cases also assume that the funds can be spent on land acquisition as well as capital facilities, ignoring possible distinctions between fees-in-lieu of dedication and capital facilities charges. Fees can be collected for water and sewer *(Dunedin)*, parks *(Hollywood, Inc.* and *Town of Longboat Key)* and roads *(Home Builders)*. The courts attempt no distinction between so-called "proprietary" versus "general government" functions, although such arguments were made in the appeals of the cases. Thus, the recent decisions give a green light to local government use of carefully drafted impact fees for a variety of purposes.

Angeles, 34 Cal. 2d 31, 207 P.2d 1 (1949); Billings Properties, Inc. v. Yellowstone County, 394 P.2d 182 (Mont. 1964); Call v. City of West Jordan, 606 P.2d 217 (Utah 1979) *on reh'g*, 614 P.2d 1257 (Utah 1980) (Supreme Court of Utah held that it was not necessary that fees paid be used solely for the benefit of the subdivision in question; it is sufficient if the fees imposed bear a reasonable relationship to the needs created by the subdivision).

E. Conclusion

In light of the Florida decisions, a farmland preservation impact fee in Florida should be judicially acceptable, provided it shows a reasonable connection or rational nexus in two ways: (1) the fees offset needs sufficiently attributable to new developments that convert agricultural lands to non-agricultural uses; and (2) the funds collected, for farmland preservation programs are adequately earmarked for the sufficient benefit of the new development residents. If the impact fees are successfully collected the most appropriate use of those funds would be the purchase of development rights or agricultural conservation easements. These rights or easements would serve to restrict land to agricultural use and at the same time inject money into the farm operation to economically preserve the agricultural operation. Perhaps in many areas, the purchase would be compulsory thereby restricting the farmland to agricultural use only whether or not such is the desire of the landowner. The effect would be similar to that of an exclusive agricultural zoning plan. However, the important difference is that the landowner's economic loss would be voluntarily compensated or at least mitigated by the payment received for the development rights or the agricultural conservation easement. The format of such a compulsory purchase of development rights or agricultural conservation easement program has been discussed elsewhere and need not be repeated.[110] The only thing innovative about the current proposal is total or partial funding of such a program through an agricultural lands preservation impact fee.

Is this proposal too radical for consideration? Perhaps, but in its defense, let it be remembered that no use of general tax revenues is called for. Real property ownership rights are protected by mitigation of loss payments when the economic value of such rights are restricted, and one of the economic impacts of new development is placed, not on society in general or farmers in particular, but on those landowners and developers that reap the economic profits from new development. Is not the current system

110. *See* Freilich, *Saving the Land: The Utilization of Modern Techniques of Growth Management to Preserve Rural and Agricultural America*, 13 URB. L. 27, 42 (1981); Torres, *Helping Farmers Saving Farmland*, 37 OKLA. L. REV. 31 (1984); Comment, *"Right to Farm" Statutes - The Newest Tool in Agricultural Land Preservation*, 10 FLA. ST. U.L. REV. 415, 419-42 (1982).

which forces land into continued agricultural use without mitigation of economic loss and/or deprives governments and their constituencies of economically viable farmland preservation programs the truly radical and unacceptable approach to a farmland preservation crisis?